Hossain v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 42–17 OF 2007-II
HAMID SULTAN JC
29 JUNE 2007

Criminal Procedure — Arrest — Consideration of charge — Appellant charged for illegal entry into the country — Appellant charged on five counts for same offence — Whether there was patent injustice — Passport Act 1966 — Immigration Act 1959/63 — Criminal Procedure Code s 306(7)

Criminal Procedure — Sentence — Considerations in imposing fine — Act permitted custodial sentence — Appellant a first offender — Whether sentence should be altered to a fine

The appellant, a Bangladesh national, was charged in the sessions court on four counts relating to illegal entry into the country under the Passport Act 1966 and another under the Immigration Act 1959/63 (using a passport belonging to another person and altering it), to which he pleaded guilty. He was sentenced to two years per charge and six months for the fifth charge, the sentences served concurrently. The appellant appealed against the sentence stating, inter alia, it was excessive. The deputy public prosecutor opposed the appeal stating, inter alia, that the appellant could only appeal as to the extent of the legality of the sentence; that the mitigating factors of the appellant should not have been taken into account and the requirements of s 306(7) of the Criminal Procedure Code have not been met. The issues before the court were: (i) whether it was a right exercise of discretion to charge the accused for five charges which are interwoven when the central allegation against the accused was that he had entered the country illegally; and (ii) whether as a general rule a fine should be imposed in the first instance when the Act permits a custodial sentence.

Held, setting aside the order of the session court and substituting them with new orders:

(1) The procedural requirement of s 306(7) was waived as the appellant was a foreigner, pleaded ignorance of the country's law and complained about patent injustice. The court also exercised its revisionary powers to do justice without the need for directing the petition of appeal to be amended (see para 7).

(2) The High Court sitting in its appellate or revisionary jurisdiction will not alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts

which the court ought to take judicial notice of. The court will not alter a sentence merely because it might have passed a different sentence (see para 8).

(3) If Parliament deemed it fit that it may be a fine or imprisonment or both, the court has a duty to consider first a fine for first offenders. However, if imprisonment was intended to be imposed, the court must state its ground why the fine was not imposed. Courts do not have a general power to act arbitrarily on issues of sentencing in a manner to make the provisions of fine otiose and award imprisonment to first offenders when that is not the intention of Parliament. Such imprisonment may also affect the public purse. The question of revenue and liability to the public must be balanced on the whole in the public interest to ensure that such offenders are deterred (see para 9).

(4) The respondent failed to address the court on the core issue relating to fine. There was patent injustice in the conduct of the prosecution for having charged the accused for five charges relating to one offence. To charge a person for illegal entry was acceptable but to have preferred five charges based on circuitous logic was not and was illegal. There was some third party who was instrumental for the forgery. There was a genuine doubt that the accused could have been a victim of circumstance. The accused may have pleaded to the facts of the charge but the court did not accept such facts which were extremely incriminating and made during police custody without legal representation (see para 11).

(5) When Parliament prescribes fines or a custodial sentence there is a requirement first to consider whether a fine would be appropriate (see para 13). It would be prudent for the court to make the necessary directions in cases involving foreigners to ensure they are immediately deported and are not unnecessarily detained and languished in jails or immigration camps (see para 15).

[Bahasa Malaysia summary

Perayu, seorang warganegara Bangladesh, telah dituduh di mahkamah sesyen atas empat pertuduhan berkaitan kemasukan haram ke dalam Negara di bawah Akta Pasport 1966 dan satu lagi di bawah Akta Imigrasi 1959/63 (dengan menggunakan pasport milik orang lain dan mengubahnya), yang mana beliau telah mengaku bersalah. Beliau telah dijatuhkan hukuman penjara dua tahun untuk setiap pertuduhan dan enam bulan untuk pertuduhan kelima, hukuman-hukuman tersebut hendaklah berjalan serentak. Perayu telah merayu terhadap hukuman dengan menyatakan, antara lain, adalah melampau. Timbalan pendakwa raya membangkang rayuan itu dengan menyatakan, antara lain, bahawa perayu hanya boleh merayu berkaitan kesahan hukuman; bahawa faktor-faktor mitigasi perayu tidak patut diambilkira dan keperluan s 306(7) Kanun Prosedur Jenayah tidak dipenuhi. Isu-isu di hadapan mahkamah adalah: (i) sama ada ia adalah penggunaan budi bicara yang betul untuk menuduh tertuduh untuk lima pertuduhan yang berkaitan apabila dakwaan terhadap tertuduh adalah bahawa beliau telah memasuki Negara secara haram; dan (ii) sama ada sebagai rukun am dendan patut dikenakan pada mulanya jika Akta membenarkan hukuman tahanan.

Diputuskan, mengenepikan perintah mahkamah sesyen dan menggantikannya dengan perintah baru:

(1) Keperluan prosedur s 306(7) telah diketepikan kerana perayu merupakan orang asing, yang mengaku tidak mengetahui undang-undang Negara dan mengadu tentang ketidakadilan yang ketara. Mahkamah juga menggunakan kuasa semakannya untuk melaksanakan keadilan tanpa perlu mengarahkan petisyen rayuan dipinda (lihat perenggan 7).

(2) Mahkamah Tinggi yang bersidang dalam bidang kuasa rayuan atau semakannya tidak akan mengubah hukuman kecuali jika ia berpuas hati yang hukuman mahkamah bawahan adalah terlalu ringan atau terlalu berat atau tidak sah atau sebaliknya bukan satu hukuman yang betul setelah mengambilkira kesemua fakta-fakta yang dikemukakan aras rekod atau terhadap semua fakta yang mahkamah patut ambil notis kehakiman. Mahkamah tidak akan mengubah suatu hukuman hanya kerana ia mungkin memberikan hukuman berbeza (lihat perenggan 8).

(3) Sekiranya Parlimen menganggap ianya sesuai untuk mengenakan denda atau pemenjaraan atau kedua-duanya, mahkamah mempunyai tanggungjawab untuk mempertimbangkan terlebih dahulu denda untuk pesalah kali pertama. Bagaimanapun, jika pemenjaraan diputuskan, mahkamah hendaklah menyatakan alasannya kenapa dendan tidak dikenakan. Mahkamah tidak mempunyai kuasa am untuk bertindak sewenang-wenangnya berhubung isu-isu penghukuman dalam cara membuat peruntukan denda lewah dan award pemenjaraan untuk pesalah kali pertama jika itu bukan niat Parlimen. Pemenjaraan sebegini juga mungkin menjejaskan wang rakyat. Persoalan tentang hasil dan liabiliti terhadap masyarakat hendaklah diimbangi secara keseluruhannya demi kepentingan awam untuk memastikan bahawa pesalah-pesalah sebegini dihalang (lihat perenggan 9).

(4) Responden gagal mengutarakan kepada mahkamah berhubung isu penting berkaitan denda. Terdapat ketidakadilan tidak ketara dalam perlakuan pihak pendakwaan dengan menuduh tertuduh untuk lima pertuduhan berkaitan satu kesalahan. Untuk menuduh seseorang kerana masuk secara haram boleh diterima tetapi untuk membuat lima pertuduhan berdasarkan logik tidaklah sedemikian dan menyalahi undang-undang. Terdapat pihak ketiga yang menjadi alat untuk kepalsuan ini. Terdapat keraguan tulen bahawa tertuduh mungkin menjadi mangsa keadaan. Tertuduh mungkin telah merayu terhadap fakta-fakta pertuduhan tetapi mahkamah tidak menerima fakta-fakta sedemikian yang menunjukkan sesuatu yang bersalah dan dibuat semasa dalam tahanan polis tanpa wakil sah (lihat perenggan 11).

(5) Semasa Parlimen menyarankan denda atau hukuman tahanan terdapat keperluan terlebih dahulu untuk mempertimbangkan sama ada dendan itu sesuai (lihat perenggan 13). Adalah wajar untuk mahkamah membuat arahan sedemikian dalam kes-kes yang melibatkan orang asing untuk memastikan mereka dengan segera dideportasi dan tidak semestinya ditahan dan berada dalam penjara atau kem-kem pendatang asing (lihat perenggan 15).]

Notes

For cases on considerations in imposing fine, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras.

For cases on consideration of charge, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1077–1079.

Cases referred to

Abu Bakar bin Alif v R [1953] MLJ 19 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88 (refd)
Leong Kok Huat v Public Prosecutor [1998] 6 MLJ 413 (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (refd)
PP v Gunasekaran a/l Arjunan & Anor [2006] 5 MLJ 527 (refd)
PP v Leo Say & Ors [1985] CLJ (Rep) 683 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Md Rashid bin Harun [2000] 3 MLJ 503 (refd)
R v Fairbarin (1981) Crim LR 190 (refd)
R v Hanbury (1980) Crim LR 63 (refd)
R v Leo De Cruz [1935] MLJ 1 (refd)
R v Markwick (1953) 37 Cr App R 125 (refd)
R v Reeves (1972) 56 Cr App R 366 (refd)

Legislation referred to

Immigration Act 1959/63 s 55D
Criminal Procedure Code s 306(7)
Passport Act 1966

Appeal from: Criminal Cases SC–SC–62–47 of 2007 (Sessions Court, Semuja)

Appellant in person.
Steve Ritikos (Deputy Public Prosecutorm, Attorney General's Chambers Kuching, Sarawak) for the respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the appeal of the Bangladesh national who has pleaded guilty to five charges relating to one illegal entry into the country. The appellant was sentenced to two years each for each charge except the fifth charge where he was sentenced to six months. The sentence was ordered to be served concurrently.

[2] The five charges read as follows:

(i) That you on 11 January 2007, at about 1240 hrs at Immigration checking Counter, Departure Hall of Kuching International Airport, Kuching Sarawak, was found without lawful authority had used one Bangladeshi passport no R746583, belonging to Alim Miah Late Abd Kashem Miah of which the name and particular of the holder of the

passport is found not belonging to you and the original photograph had been unlawfully altered and thereby you have committed an offence under s 12(1)(a) of the Passport Act 1966 (Act 150) and punishable under s 12(1) of the said Act.

(ii) That you on 11 January 2007, at about 1240 hrs at Immigration checking Counter, Departure Hall of Kuching International Airport, Kuching Sarawak, was found had intentionally impersonated and represented yourself as Alim Miah Late Abd Kashem Miah by producing the passport no R746583 which had been duly issued to another person other than yourself and thereby you had committed an offence under s 12(1)(b) of the Passport Act 1966 (Act 150) and punishable under s 12(1) of the said Act.

(iii) That you on 11 January 2007, at about 1240 hrs at Immigration checking Counter, Departure Hall of Kuching International Airport, Kuching Sarawak, with intention had produced one Bangladeshi passport no R0746583, belonging to Alim Miah Late Abd Kashem Miah to obtain an exit pass endorsement for your own use of which to your knowledge has been false in a material particular in that the photograph had been altered, and thereby you had committed an offence under s 12(1)(c) of the Passport Act 1966 (Act 150) and punishable under s 12(1) of the said Act.

(iv) That you on 11 January 2007, at about 1240 hrs at Immigration checking Counter, Departure Hall of Kuching International Airport, Kuching Sarawak, was found without lawful authority in your possession one Bangladeshi passport no R0746583, belonging to Alim Miah Late Abd Kashem Miah for your own use of which to your knowledge the used of the passport had been issued for some other person than yourself, thereby you have committed an offence under s 12(1)(f) of the Passport Act 1966 (Act 150) and punishable under s 12(1) of the said Act.

(v) That you on 11 January 2007, at about 1240 hrs at Immigration checking Counter, Departure Hall of Kuching International Airport, Kuching Sarawak, was found without lawful authority had in your possession a pass which had been forged in the passport (at page 15) by the name Alim Miah Late Abd Kashem Miah passport no.R0746583 thereby you had committed an offence under s 12(1)(f) of the Passport Act 1966 (Act 150) and punishable under s 12(1) of the said Act.

[3] At the out set of the proceedings, I have told the prosecution to address me on two issues: (i) whether it was a right exercise of discretion to charge the accused for five charges which are inextricably interwoven when the central allegation against the accused is that he had entered the country illegally; (ii) whether as a general rule a fine should be imposed in the 1st instance when the Act permits or custodial sentence. The respondent relied on the following authorities, namely: (i) *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; (ii) *Public Prosecutor v Leo Say & Ors* [1985] CLJ (Rep) 683 (iii) *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; (iv) *Public Prosecutor v Gunasekaran a/l Arjunan & Anor* [2006] 5 MLJ 527.

[4] The notes of proceedings, inter alia, are as follows:

Accused: I understand the 1st charge and plead guilty. I admitted that I was using the passport belonging to Alim Miah Late Abd Kashem Miah. I admitted that the original photograph in the passport has been altered.

I understand that upon conviction the maximum penalty under the law is RM10,000 fine or five years imprisonment or both. I still plead guilty to the charge.

I understand the second charge and plead guilty. I admitted I intentionally presented myself as Alim Miah Late Abd Kashem Miah.

A I understand that upon conviction the maximum penalty is RM10,000 fine or five years imprisonment or both. I still plead guilty to the charge.

I understand the third charge and plead guilty. I admitted that I presented a passport belonging to Alim Miah Late Abd Kashem Miah in order to obtain an exit pass endorsement for myself. I admitted that the passport was false in its material particular ie the photograph was altered.

B

I understand that upon conviction the maximum penalty is RM10,000 fine or five years imprisonment or both. I still plead guilty to the charge.

I understand the fourth charge and plead guilty. I admit that I was in possession of one Bangladesh passport belonging to Alim Miah Late Abd Kashem Miah without any lawful authority.

C

I understand that upon conviction the maximum penalty under the law is RM10,000 fine or five years imprisonment or both. I still plead guilty to the charge.

I confirm that each of the five offences were committed on 11 January 2007 at 12.40pm. I confirm the place of the offence was the Immigration Checking counter, Departure Hall of Kuching International Airport. I understand that with my plea of guilty in respect of all four charges there will not be any trial and the court will sentenced me if the court accepts my plea of guilty. I still plead guilty to the charges. …

D

Mitigation: Plead for leniency. I am married with children. I hope to be sent home. …

Court: The accused is convicted of his own plea of guilty and admission to the brief facts of case in respect of all five charges. After considering all the relevant factors I sentenced the accused to two years imprisonment for each of the 1st–4th charges and 6 months imprisonment for the fifth charge. All the sentences to run concurrently and to take effect from the date of arrest. The accused is informed that he has 10 days from today to file his appeal against the sentences.

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[5] The grounds of decision of the learned sessions court judge relating to sentencing are as follows:

The accused faced five charges four of the offences under the Passport Act 1966 and another under the Immigration Act 1959/63. The charges were all concerned with the accused's being found in possession of a fake passport belonging to another person but with the photograph of the accused replaced with that of the original holder of the passport.

G

In the first charge, the offence was one of possession of the fake passport with the photograph altered under se 12(1)a of the Passport Act 1966. The second charge was for impersonation of the original holder of the passport by the production of the fake passport which was an offence under s12(1)b of the said Act. In the third charge it was the production of the said passport in order to obtain an exit pass endorsement. For the fourth charge under s 12(1)f of the said Act it was also for possession of the fake passport without any lawful authority for the accused's own use and in respect of the final charge, it was for possession of a fake pass under s 56(1)(L) of the Immigration Act 1959/63.

H

The offences were allegedly committed at the Kuching International Airport on the 11 January 2007.

I

The accused pleaded guilty to all 5 charges. In the facts of the case tendered, it was shown that the accused was arrested as he was about to depart for Kuala Lumpur on an Air Asia flight. He was detained with three fellow Bangladeshis who were all in possession of a fake passport as well and who were charged together with him before me. These other accused

persons were Mizanur Rahman Abdul Mozid (Criminal case no SC–SC–62–46–2007), Aktarul Kabir Late Ajejar Ali (Criminal case no SC–SC–62–49–2007) and Johirul Jomir (Criminal case no SC–SC–62–48–2007).

I have after hearing the mitigation of the accused sentenced him to two years imprisonment in respect of each of the offences under the Passport Act and six months imprisonment for the offence under the Immigration Act. I ordered the sentences of imprisonment to run concurrently because the offences, in particular those under the Passport Act were duplication of each other and all were committed in the same transaction.

The sentences of fine and imprisonment were imposed to reflect the gravity of the offences committed. The offences related to being in possession of a fake passport should not be viewed lightly as it facilitated the movement of an otherwise unauthorised person in the country. Collolary to that is the falsification of the record of movement of the accused with our authorities especially the Immigration authority. Further I have noted the increasing number of Bangladeshis being caught with fake passports and even the 'suppliers' of these fake passports had been brought to justice and sentenced by me. (See *PP v Suli Lasap* (SC–62–735–06-III)).

The prosecution in this case have alleged that a syndicate was in operation and have urged that a deterrent sentence be imposed. I agree. The gravity of the offence far outweighed the accused's plea of guilty than their clean record and the accused's mitigation which, by the way, does not offer any reason for me to be lenient with my sentence. Taking all the circumstances into consideration, I have decided that the sentences as imposed was the most appropriate one to mete out in this case. I have mentioned earlier that the accused was charged with three other Bangladeshis and although each charge was registered in a separate file, the date, time and place, the facts of the cases and even the mitigations of the accused were alike. I see therefore nothing wrong in preparing identical grounds of sentencing for all four accused persons, including the 3 I named earlier.

[6] The appellant stands before me and through the assistance of Bangladesh interpreter pleads that the sentence is excessive. He asserts that he does not know the law of Malaysia and just came to earn a living. He vehemently apologises to the court and says he is only a first offender and the sentence must be reduced. The learned DPP says that his grounds for reduction of sentence are only mitigating factors and should not be taken into account and the sentence of the lower court must be upheld. I agree, under procedural law what the learned DPP says is correct as in this case the appellant has not satisfied the rudimentary requirements of s 306(7) which I have dealt in detail in *Leken @ Delem ak Gerik (m) v Public Prosecutor* [2007] 3 MLJ 730. The relevant part is reproduced here for the purpose of this appeal; and it reads as follows:

8. Courts have taken strict and liberal approach in interpreting various provisions of s 307 according to the justice of the case garnered from various cases, to mention a few are as follows: (i) *Pitting bin Haji Mohamed Ali v PP* [1979] 2 MLJ 136; *Jayasankara v PP* [1983] 1 MLJ 379; (iii) *PP v Tan Tho Kim and 3 Ors* [1978] 2 MLJ 65. I will not deal with this issue as the learned DPP has not taken any objections as to the contents of the petition for good reasons, inter alia, that the accused is not legally represented. I commend him for doing so. In ordinary circumstances, if the accused if represented, I would have required strict compliance of s 307(6) of the CPC. In any event, I would not have dismissed the appeal for non-compliance of a mandatory procedural requirement of the section but would have given the appellant the opportunity to amend the petition of appeal without the need to take the drastic step of dismissing the appeal.

A [7] The core value of our justice system does not solely depend on a procedural compliance as a sine qua non to administer justice. Courts have powers to condone non-compliance of procedure on the facts of each case. In this case, I am inclined to waive the procedural requirement set out in s 306(7) as the appellant is a foreigner and stands before the court pleading that he does not know the law of this country
B and complains about patent injustice. In such circumstances, the court can also exercise its revisionary powers to do justice without the need for directing the petition of appeal to be amended.

[8] As a general rule, the High Court sitting in its appellate or revisionary
C jurisdiction will not alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of. That is to say, the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence
D merely because it might have passed a different sentence as echoed in the case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 which originates from established cases. These principles were well articulated by Raja Azlan Shah Ag LP (as HRH then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 (as HRH then was) where it was opined:

E

> I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different
F conclusions (see *Jamieson v Jamieson* [1952] AC 525, p 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge.

G [9] The above salient observation of HRH is one which the prosecution need to memorise at all times when appearing before the appellate court and not argue that 'it is not just because the statute provides for the fine, the court should not impose imprisonment instead.' I will say that if Parliament deems it fit that it may be fine or imprisonment or both, the court has a duty to consider first a fine for first
H offenders and not imprisonment. However, if imprisonment is intended to be imposed, the court must state its ground why fine was not imposed in particular. Courts do not have a general power to act arbitrarily on issues of sentencing in a manner to make the provisions of fine otiose and award imprisonment to first offenders when that is not the intention of Parliament. Further, such imprisonment
I may also affect public purse and that may be a relevant consideration to be taken into account, when Parliament says fine (deterrence plus it is a revenue) or imprisonment (deterrence but liability to the public). The question of revenue and liability to the public must be balanced on the whole in public interest to ensure that such offenders are deterred. Parliament has entrusted it to the court to decide what will be appropriate when it enacts provision for fine or imprisonment. This entrustment on

the courts cannot be a subject of complaint by the prosecution in England under the common law. In respect of this area of law, learned author Christopher J Emmins in his book 'A practical approach to criminal procedure' makes the following observation:

> Second, the Court of Appeal does not attempt to prescribe the one right sentence for a particular case. Instead, their Lordships allow Crown Court judges a broad discretion, and, in general, only interfere to reduce a sentence if it is outside the range of sentences appropriate to the gravity of the offence when taken in conjunction with any mitigating factors. Third, there is no procedure which enables the Court of Appeal to pronounce a sentence too light. The prosecution cannot appeal against a sentence they consider over lenient, while if the defence appeal (against conviction or sentence) the Court of Appeal has no power to increase sentence. The most their Lordships can do is state that, far from the sentence being too severe, they would, if they had been sitting in the Crown Court, have imposed a harsher penalty.

In *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27, Wan Yahya J opined:

> … right to impose punishment on a guilty is absolutely the discretion of the court. It will exercise judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or defence in respect of such right.

[10] The learned DPP in opposing the appeal, inter alia, submits as follows:

(a) the appellant can only appeal as to the extent of the legality of the sentence. Upon perusal of the notes of proceedings, the sentences were in no way illegal.

(b) In *Public Prosecutor v Md Rashid bin Harun* [2000] 3 MLJ 503 (HC), it was opined:

> .. it is an established principle that the sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances (*PP v Fam Kim Hock* [1957] MLJ 20; see also *Liow Chow v PP* [1939] MLJ 170), manifestly excessive or inadequate (see *Abdul Rahman bin Ibrahim* [1938] 7 MLJ 219), or "unless the (subordinate court had) proceeded on wrong principles or given undue weight to some of the evidence(*Rex v Leo De Cruz* [1935] 4 MLJ 1), or that in fixing the sentence the subordinate court had failed to adequately consider all the relevant factors either for or against the offender (*Joginder Singh v PP* [1984] 2 MLJ 133). It is (also) an established principle that an appellate court should be slow to interfere with or disturb a sentence passed by the court below.... the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence (*PP v Mohamed Nor & Ors* [1985] 2 MLJ 200 per Abdul Hamid CJ (Malaya) as he then was). An appellate court must reject the lore of nicely calculated less or more in matters of sentence (*Liow Chow & Anor v PP*).

(c) In *R v Leo De Cruz* [1935] MLJ 1, it was stated that the Court of Criminal Appeal will not interfere with the decision of the court below on the question of sentence, unless the judge has proceeded on wrong principles or given undue weight to some of the evidence.

(d) The offences committed were serious in nature. They directly are a threat to the security of the country. The courts should not compromise when the security of the nation is threatened.

(e) In *Pendakwa Raya lwn Shariffah bte Syed Hashim* [2006] 5 MLJ 381, it was opined:

> [9] Berdasarkan kepada prinsip yang dijelaskan oleh hakim berkenaan mahkamah ini mengambil pendekatan bahawa kesesuaian sesuatu hukuman yang dijatuhkan itu adalah bergantung kepada berbagai-bagai perkara dan pertimbangan yang harus diambil kira oleh mahkamah selain daripada kepentingan awam. Berbagai faktor lain harus diberi pertimbangan. Seperti kata Augustine Paul H di dalam kes *Tan Kay Chen v Public Prosecutor* [2000] 4 CLJ 492 pada ms 496 dalam memperkatakan tentang peruntukan s 173(m)(ii)Kanun Prosedur Jenayah:
>
> > The phrase 'pass sentence according to law' in the subsection means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252, PP v Jaafar Daud [1981] 1 MLJ 315, *Philip Lau Chee Heng v PP* [1988] 3 MLJ 107). The assessment of a sentence in accordance with judicial principles clearly contemplates, inter alia, a consideration of the mitigating circumstances in favour of the person to be sentenced. It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v PP* [1975] 2 MLJ 134, *PP v Sulaiman b Ahmad* [1933] 1 MLJ 74, *PP v Ravindran & Ors* [1993] 1 MLJ 45). However, it is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v PP* [1996] 4 CLJ 441, *Lee Say & Ors v PP* [1985] 2 CLJ 155). The severity of the offence may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng v PP* [1980] 2 MLJ 13, *PP v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v PP* (1995) 1 SCR 537, *R v Costen* (1989) 11 Cr app R (s) 182). Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. (see *PP v Govindan Clinden Nair* [1998] 2 CLJ 370). Be that as it may, as I said earlier it must not be overlooked that the general rule is that an accused should be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so.

[11] Despite my directions, the respondent has failed in this case to address the court on the core issue relating to fine. To me as a judge, I see patent injustice in the conduct of the prosecution for having charged the accused for five charges relating to one offence. Such policies by the chambers must be reconsidered and stopped for better administration of criminal justice. Even the learned sessions judge had come to a conclusion that 'the charges were duplication of each other and all were committed in the same transaction'. We must not only be a country having strong foundation in religious principles and values but also be seen to practice core value of justice within the spirit and intent of the Federal Constitution and Rukun Negara. Prosecution must not be strayed into thinking that every illegal entry impinges on national security. If that is the case, Parliament will have imposed much severe punishment. I think it is an unnecessary phobia. To the credit of Malaysia, in the last

few hundred years it is a well known fact to all that it is not just a country which will provide bread and butter only, but there is also honey and milk to go with for those who are industrious. Thus, there have been much migrant problems for quiet some time. Parliament has been aware of such problem. It is not a new issue and Parliament has deemed fine or imprisonment or both as adequate for cases of illegal entry. This is also the case in almost all civilized country. To charge a person for illegal entry is quiet acceptable but to prefer five charges based on circuitous logic is unacceptable and will be illegal. To say such people who are trying to come to earn a honest living but have been cheated by some third parties are national security threat is unacceptable. This is a case where the facts show that there was some third party who was instrumental for the forgery. There is a genuine doubt that the accused could have been a victim of circumstance. I am aware that the accused have pleaded to the facts of the charge but this court will not accept such facts which are extremely incriminating and made during police custody without legal representation.

[12] I have in *Leken @ Delem Ak Gerik (m) v Public Prosecutor*, set out what amounts to distinct offences in detail. I do not wish to repeat the same here save as to say that what I have stated there will equally apply. I consider all the five charges are one and the same for the purpose of sentencing, even though prosecution has preferred separate charges to seek sentence in aggregate. I do not wish to rule such method is illegal as I have not heard arguments from the appellant and the appellant is not represented. To decide the fate of the appeal, I must consider whether on the facts of the case a fine should be appropriate as an alternative to custodial sentence.

[13] When Parliament prescribes fine or custodial sentence there is a requirement first to consider whether a fine will be appropriate (see *Leong Kok Huat v Public Prosecutor* [1998] 6 MLJ 413). The principles and law relating to fine can be summarized as follows:

(i) Any sentence, in particular fine, when imposed must be reflective of the nature and seriousness of the offence, the character and conduct of the accussed, the degree of mens rea, and the financial means of the accused (see *Abu Bakar bin Alif v R* [1953] MLJ 19).

(ii) It is a cardinal rule that fine should not be excessive and should not leave an impression with the accused that he is being persecuted (see *Kaneez Fatima* AIR 1953 Hyd 155).

(iii) The imposition of a small fine on a rich and influential person or of a heavy fine on a man who has no means is not justified. In *R v Markwick* (1953) 37 Cr App R 125, Lord Goddard CJ opined: 'persons of means should not be given the opportunity of buying their way out of prison.'

(iv) If the offence is not of a gravity to justify imprisonment, the offender should not lose his liberty merely because he is too poor to pay a substantial fine (see *R v Reeves* (1972) 56 Cr App R 366; *R v Hanbury* (1980) Crim LR 63).

(v) Where the offence allows for a fine or imprisonment or both, it is lawful to combine a fine and imprisonment (see *R v Fairbarin* (1981) Crim LR 190).

(vi) In *Leong Kok Huat*, the appellant was charged under s 55D of the Immigration Act 1959/63. This section reads as follows:

> Any person who makes, forges or alters an endorsement or a document to be used as a visa, Permit, Pass or Certificate under this Act shall be guilty of an offence against this Act and shall, on conviction, be liable to a fine of not less than thirty thousand ringgit but not more than one hundred thousand ringgit and to imprisonment for a term of not less than five years but not more than ten years and shall also be punished with whipping of not more than six strokes.

[14] The appellant was found guilty and subsequently convicted by the court below and was sentenced to: (i) a fine of RM50,000; (ii) an imprisonment term of five years; and (iii) four strokes of the rotan. Counsel for the accused applied for the case to be revised by the High Court. The High Court set aside the sentence and substituted it with only a fine of RM65,000. On appeal the court held that:

> (2) Each limb of the 'penalty part' of s 55D of the Act should be construed 'disjunctively' from one another and not 'conjunctively'. The words 'shall be liable to' found in s 55D not only gives the court a complete judicial discretion to impose the three types of penalties provided thereto either in the 'alternative' or 'cumulatively', but, in appropriate cases, it does not prevent the court to invoke s 294 of the Criminal Procedure Code (FMS Cap 6). The word 'and' found in s 55D must be construed 'conjunctively'. In the instant case and on the facts, the most appropriate sentence would be a fine in the manner specified by the first limb of the 'penalty part' in s 55D (see pp 413F, 416A–B and 419G–H).

Abdul Kadir Musa J in extensively dealing with the law in this area opined:

> A close perusal to cl 16 of the Explanatory Note to the Bill which introduced s 55D of the Act 155 vide the Immigration (Amendment) Act 1996 (s 16) only states that the section 'deals with the offence of forging or altering or endorsement of a document used as a visa, permit, pass or certificate'. It does not explain as to whether the different limbs of the 'penalty part' should be interpreted 'disjunctively' by virtue of the presence of the word 'and' and the absence of any comma after each limb of the said 'penalty part.'
>
> However, comparative analysis of a number of decided cases compelled me to conclude that the word 'and' contained thereto is intended by the legislature to have a 'disjunctive' effect for the reasons spelt out below. The *Concise Oxford Dictionary* (9th Ed, 1995) at p 46, gives the meaning of the word 'and', inter alia, as:... implying variety...
>
> Thus, the words 'implying variety' should therefore mean, in the context of the 'penalty part' of the aforesaid s 55D, 'different ways of imposing' the three types of sentences provided by the said section. The ability for the court to do so is certainly the property of the 'disjunctive method' of doing an act permitted by the said section. Thus, the presence of the word 'and' without a comma after each limb of the 'penalty part' of the said section should and must therefore be construed as 'disjunctive' in effect and not 'conjunctive' as is normally assigned to the meaning of the conjunction 'and'...
>
> My above conclusion is further enhanced by the persuasiveness of the Brunei case of *Nili Anak Gumbang & Ors v PP* [1985] 1 MLJ 464, where the court there held that, the word present in s 56 of the Emergency Immigration (Amendment) Order 1984 has a 'disjunctive' effect. In that case, Power J, at p 465G–I — where the aforesaid s 56 provides that offenders are liable 'to imprisonment for a term of not less than one year and not more than seven years and a fine not exceeding twenty thousand dollars and whipping — held that:
>
> > It seems to me clear, by virtue of s 38 of the Interpretation and General Clause Enactment 1959 ['the 1959 Enactment],... the word '*and*' shall signify that the penalties may be inflicted alternatively or cumulatively... [thus] it is open to the court under the penalty

section [or part] to impose *either* a prison sentence or a fine or whipping but that, if the court does decide to impose a prison sentence, it must be for not less than one year.

(Emphasis added.)

Section 38 of the 1959 Enactment provides as follows:

Whenever, in or by virtue of any written law, more than one penalty is prescribed for an offence, *the use of the word 'and' shall signify that the penalties may be inflicted alternatively or cumulatively...*

(Emphasis added.)

In that respect, the word 'alternatively' must necessarily mean 'disjunctively'. There is also no comma after each limb of the aforesaid penalty section. Similarly in s 55D of Act 155, the word 'and' is also present after each limb of the three type of the penalties provided thereto, and there is also no comma after each such limb. Platformed by that reasoning, I firmly concluded that the word 'and' contained in the aforesaid s 55D must therefore be intended by the legislature to be construed as 'disjunctive' and not 'conjunctive'.

From the above analysis, it can thus be concluded that, a person who had pleaded or found guilty of committing an offence under s 55D Act 155, as the accused in the instant case, is liable to be punished in one of the following:

(i) shall be liable to a fine of not less than RM30,000 but not more than RM100,000; or

(ii) shall be liable to imprisonment for a term not less than five years but not more than ten years; or

(iii) shall be liable to a fine as specified in (i) above, plus to an imprisonment term as specified in (ii) above; or

(iv) shall be liable to an imprisonment term as per (ii) above, and also to whipping of not more than six strokes; or

(v) shall be liable to a fine as per (i) above, plus an imprisonment as per (ii) above, and also to whipping of not more than six strokes. Hence, it is clearly demonstrated that, the punishment as specified in one of the 'five options' or 'alternatives' open to the court to impose, having regards to fact of each particular case, is due to the 'disjunctive' effect of the word 'and' found in the aforesaid s 55D.

Lastly, the presence of the words 'shall... be liable to...' in the aforesaid s 55D gives the court a judicial discretion as to what should be regarded by the court as an appropriate sentence having judicially considered all the facts of a particular case; and that, is now a settled law.

[15] Further, it will be prudent for the court to make the necessary directions in cases involving foreigners to ensure they are immediately deported and are not unnecessarily detained and languished in jails or immigration camps.

[16] For reasons stated above, I take the view that a total fine not exceeding more than RM5,000 would have been appropriate with default order of not exceeding six months imprisonment. However, this cannot be achieved now. To come to an appropriate sentence at this stage, taking into the account the justice of the case, a term of imprisonment is to be substituted to ensure that the accused is released immediately. The accused was arrested on 11 January 2007 and serving sentence from the date of arrest. I make the following orders and directions.

[17] The order of the learned sessions court judge be set aside and substituted with the following orders:

(i) The appellant be sentenced to five months imprisonment for the first charge.

(ii) The appellant be sentenced to five months imprisonment for the second charge.

(iii) The appellant be sentenced to five months imprisonment for the third charge.

(iv) The appellant be sentenced to five months imprisonment for the fourth charge.

(v) The appellant be sentenced to one month imprisonment for the fifth charge.

(vi) The sentence of imprisonment to run concurrently.

(vii) The sentence to commence from the date of arrest.

(viii) The appellant to be deported as soon as possible.

(ix) In the event the respondent appeals to the Court of Appeal, the appellant shall have a right of bail and for that purpose the appellant shall be produced before this court.

(x) The case is to be mentioned every 14 days or earlier in this court to ensure that the appellant is not unnecessarily kept in custody and for the relevant officer to give a report to cover why he has not been deported.

(xi) For all mentions, the appellant to be produced before the court.

(xii) The court shall make further directions or orders as it deems fit until the appellant is deported.

[18] I hereby order so.

Session court's order set aside and substituted with new orders.

Reported by Chew Phye Ken